GEORGE W. ANTHONY

IBLA 91-202 Decided June 18, 1991

Appeal from a decision of the Boise, Idaho, District Office, Bureau of Land Management, terminating a Cooperative Wildlife Habitat-Farming Development Agreement for failure to comply with terms and conditions of the agreement. Blue Gulch Isolated Tracts 43 and 74.

Affirmed.

1. Act of Oct. 18, 1974--Wildlife Refuges and Projects: Administration--Administrative Procedure: Burden of Proof

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

APPEARANCES: Jay D. Sudweeks, Esq., Twin Falls, Idaho, for appellant; Robert S. Burr, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

George W. Anthony appeals from a February 5, 1991, decision of the Boise, Idaho, District Office, Bureau of Land Management (BLM), terminating a Cooperative Wildlife Habitat-Farming Development Agreement between BLM, the State of Idaho Department of Fish and Game (IDF&G), and Anthony for the stated reason that Anthony did not comply with terms and conditions of the agreement. The agreement at issue was entered into on January 15, 1988, under the authority of the Sikes Act, as amended, 16 U.S.C. § 670g (1988), for management of public lands described as SW1/4 SW1/4, SE1/4 SW1/4, sec. 27; NW1/4 NW1/4, SE1/4 SE1/4, sec. 34; SW1/4 SW1/4, NW1/4 SW1/4, sec. 35, T. 9 S., R. 12 E., Boise Meridian (also identified as Blue Gulch Isolated Tracts 43 and 74), in combination with specific private lands. The terms of this agreement were originally negotiated in a cooperative agreement, effective

in 1977, that expired in 1984. 1/ Under the agreement, Anthony maintains 90 acres of the identified public land as irrigated permanent wildlife habitat in exchange for the right to farm approximately 199 acres. 2/

By letter dated December 21, 1988, IDF&G informed Anthony that several deficiencies in his performance of the contract had been observed and that, if they were left uncorrected, it would recommend cancelling the agreement. One of the violations reported was a failure to adequately water the wildlife habitat. By letter dated October 30, 1989, IDF&G reported to Anthony that it had noticed several more violations during the 1989 growing season and would consult with BLM regarding continuation of the agreement. Again, a failure to water the wildlife habitat was reported. 3/

IDF&G then sent a letter to BLM dated July 3, 1990, describing Anthony's failure to comply with the terms of the agreement. IDF&G suggested that the agreement be cancelled and Anthony be charged with costs to rehabilitate the 199 acres of farmland. Officials of IDF&G and BLM met and discussed the agreement on July 13, 1990, and concluded that it should be cancelled. A notice of intent to cancel was sent by the District Manager, BLM, to Anthony on July 26, 1990. By letter dated July 31, 1990, counsel for Anthony informed BLM that Anthony had not received a notice of intent to cancel from IDF&G. In a reply on August 16, 1990, BLM informed counsel for Anthony that the July 26 letter constituted official notice from both IDF&G and BLM. BLM stated that Anthony's failure to irrigate the wildlife habitat areas threatened to frustrate the objective of the agreement. BLM asked for a meeting to establish rehabilitation efforts and stated that failure to cooperate would lead to cancellation of the agreement, possible trespass charges, and assessments for rehabilitation measures. After a September 12, 1990, meeting with Anthony and IDF&G, BLM proposed a revised agreement requiring Anthony, in addition to complying with the original terms of the agreement, to irrigate an additional 19 acres of wildlife habitat and to provide a reclamation bond. Anthony rejected these proposals, and BLM issued a decision on February 5, 1991, terminating the agreement.

In his statement of reasons, Anthony alleges that BLM's decision is arbitrary and capricious because it failed to consider public needs, the

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1/ The cooperative arrangement was allowed to continue between 1985 and 1987 without the benefit of a formal agreement. Prior to 1988, deficiencies in Anthony's compliance with the Agreement were noted in 1979, 1981, and 1985 (Memorandum to Jarbridge Area Manager from Staff Biologist, subject History of Anthony Coop Farm Agreement).

2/ The agreement provides that agricultural crops are to be rotated as follows: "[p]otatoes one year in three, no two years in succession. * * * In those years that grain is grown, 100 acres of stubble or stubble mulch will be left." Agreement at 2, Items 1 and 5.

3/ Although a record of the meetings is not in the case file before us, it is reported that officials of IDF&G or BLM met with Anthony regarding the agreement on Mar. 9, 1988, Aug. 1, and Nov. 22, 1989, and conducted telephone conversations with Anthony on May 9 and June 2, 1989.

desires of IDF&G, and the improvements to the property. He argues that BLM's report of IDF&G's desire to cancel the agreement is not true and should not be grounds for cancellation. He further contends that BLM attempted to coerce him into a new contract containing requirements not in the original agreement and asserts that it was his refusal to accept those new terms which led to termination of the agreement. Anthony argues that many of BLM's facts are incorrect, including an allegation that seed planted by Anthony had failed to mature. Anthony claims he was not responsible for this failure because the seed mix had been obtained from a BLM-approved supplier who had tampered with the mixture and that BLM had prior knowledge of the problem. He also asserts that some of the other reasons for cancellation were based on damage by third parties.

In answer, BLM argues that the decision to cancel the agreement was neither arbitrary nor unilateral. The decision, BLM asserts, was within the terms of the agreement at Item 2 at page 3. BLM also avers that IDF&G was directly involved in the decision as evidenced by at least two written communications from IDF&G to BLM, explaining that the two agencies jointly decided that habitat values for which the agreement was initiated were not being enhanced by Anthony. BLM claims that the proposal of new terms was not made in retribution but in an attempt to save the arrangement by introducing measures designed to correct past problems and ensure public values. BLM denies Anthony's assertions that third-party damage was considered in the decision to cancel.

BLM requests under 43 CFR 4.21(c) that its decision be placed into full force and effect. Anthony has not responded to this request. Review of the case file establishes that the motion should be granted, and, under the circumstances shown, the decision appealed from should be affirmed.

[1] The Sikes Act of September 15, 1960, P.L. 86-797, 16 U.S.C. § 670 (1988), authorized the Secretary of Defense to carry out a program of planning, development, maintenance, and coordination of wildlife, fish, and game conservation, public recreation, and rehabilitation on military reservations in accordance with a cooperative plan agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency in which the reservation is located. S. Rep. No. 934, 93rd Cong., 2d Sess. 1, reprinted in 1974 U.S. Code Cong. & Ad. News 5790, 5791. The success of the program encouraged Congress in 1974 to extend the concept and authorize implementation of the program on other public lands throughout the United States. Id. at 5790, 5796; Act of October 18, 1974, section 2; P.L. 93-452, 88 Stat. 1369. In achieving this purpose, the Secretary of the Interior is required in cooperation with the state agencies to formulate comprehensive plans to develop, maintain, and coordinate programs for the conservation and rehabilitation of wildlife, fish, and game for appropriate public lands under the Secretary's control. 43 U.S.C. §§ 670g, 670h (1988). Such programs would include habitat improvement projects and related activities. Id.

Pursuant to the Act, BLM and IDF&G developed a Master Memorandum of Understanding (MMOU) stating the responsibilities of each agency to accomplish the purpose of the Act. A July 7, 1975, supplement to the MMOU provides that the respective district offices of BLM and the regional offices of IDF&G shall be responsible for development of an implementing document, the site-specific cooperative agreement. One such agreement employed in Idaho is the contract farm agreement (CFA) "designed to provide wildlife food and/or cover." BLM Manual, Idaho State Office Supp., Section 6525.3. The CFA is an arrangement between a private landowner in the agricultural production business and BLM to farm specified public lands administered by BLM on a crop-share basis, with a percentage of the crops produced not to be harvested but instead to be left on the land to provide food and cover for wildlife. Id. at section 6525.05.D. Responsibility for day-to-day management of the program on the specific site is with the local office of IDF&G. Id. at section 6525.31.

The site-specific CFA between BLM, IDF&G, and Anthony, the "Cooperative Wildlife Habitat-Farming Development Agreement," specifies that wildlife habitat will be created from portions of the lands identified in the agreement. In exchange for the use of 199 acres of public lands, Anthony agreed to maintain in good condition 90 acres of irrigated wildlife habitat (Agreement at 2, Items 2, 3). In addition, he agreed to maintain ditches and sprinkling systems on these lands, apply approved pesticides and herbicides, and maintain all fences (Agreement at 2, Items 7-9). Anthony agreed to (1) water all wildlife areas at least three irrigations per growing season for a total minimum of 9 inches and water the shelter-belt area to ensure each tree and shrub receives proper water, (2) notify IDF&G of each irrigation, (3) purchase and plant wildlife seed mixture on 65 acres of the wildlife habitat, and (4) re-establish an access road across an identified segment to prevent vehicular traffic across the wildlife habitat (Amendment to Agreement, Items 2-5). Assignment without written permission from IDF&G and BLM and inclusion of these lands in a Federal subsidized program was prohibited (Agreement at 3, Item 10, and at 4, Item 8).

o ensure Anthony's compliance with these terms and conditions, the agreement provided:

> This Agreement may be terminated or cancelled due to non-compliance with the terms of this Agreement * * *. Any non-compliance as determined by the Department Director and BLM District Manager or their duly authorized agents will be just cause for cancellation or termination of all provisions of this Agreement and trespass action may be taken by BLM.

(Agreement at 3, Item 2). IDF&G informed Anthony of noncompliance in each of the years this agreement was in effect. In 1988, the following deficiencies were noted:

> 1) The wildlife seed mixture was not planted in the spring. However, we understand it was completed in the fall.

2) The wildlife habitat was not irrigated.

3) The access road to discourage vehicle travel across the wildlife habitat was not re-established.

(Dec. 21, 1988, Letter to Anthony from Carl H. Nellis, Supervisor, Region 4, IDF&G). The 1989 deficiencies were identified as follows:

1. The Agreement was assigned to others without written permission from the Department or BLM.

2. The habitat areas were not or were inadequately watered.

3. The Department was not notified of habitat irrigations.

4. The newly created road paralleling the shelterbelt has not been effectively blocked.

(Oct. 30, 1989, Letter to Anthony from Supervisor Nellis). In the August 16, 1990, letter to Anthony's counsel from BLM, Anthony was informed that BLM and IDF&G had jointly concluded that the objective of the agreement, the establishment and preservation of wildlife habitat, had not been achieved because Anthony had failed to properly irrigate. 4/

Contrary to Anthony's assertions, the decision to cancel the agreement was not independently conceived by BLM. The agreement provided that IDF&G would monitor the agreement (Amendment to Agreement, Item 1). The case file before us establishes that IDF&G noticed Anthony's failure to comply with the agreement, contacted Anthony about these violations, informed him that failure to correct would jeopardize the agreement, contacted BLM to discuss the agreement in light of Anthony's noncompliance, and recommended to BLM that the agreement be terminated.

4/ The case file also includes a letter from the Twin Falls County Bureau of Noxious Weed Control, Twin Falls, Idaho, informing IDF&G that an Aug. 9, 1990, inspection of the subject lands revealed they were heavily infested with Canada thistle, a noxious weed, in violation of the Idaho State Noxious Weed Law. The letter stated that "very little or no apparent control has been done to noxious weeds." (Emphasis in original.) Further, BLM's answer contains documentation showing that in 1988 and 1990 Anthony received Federal subsidy payments for crops grown on the public lands subject to the agreement. Although BLM's decision did not specify either cause as reason for termination and therefore appellant did not, prior to appeal, have an opportunity to respond concerning either of these charges, each of these fact situations would constitute additional violations of the agreement. Anthony has objected to any attempt to raise additional grounds for cancellation during review. The decision to cancel the agreement did not consider these matters, and it is therefore unnecessary for us to do so in our review. We therefore express no opinion concerning these additional allegations of deficiency.

Anthony contends that the decision is based on erroneous facts reported by BLM. He has not, however, offered any proof of this assertion, which is stated in conclusory terms. An appellant before the Board bears the burden to show, by a preponderance of the evidence, that a challenged decision is in error. Galand Haas, 114 IBLA 198 (1990). IDF&G and BLM have presented evidence of inspections that reveal the agreement was properly terminated because Anthony had not complied with its terms and conditions. The primary objective of the agreement, as stated in the authorizing statute, the MMOU, and the agreement, was to provide wildlife habitat.

Anthony does not contend that the deficiencies reported by IDF&G did not occur as reported, but disputes that he was responsible for them. There is an established legal presumption, which is rebuttable, that official acts of public officers are regular. Desert Survivors, 80 IBLA 111 (1984); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). Accordingly, the conditions stated as grounds for termination are presumed to be those encountered by IDF&G and BLM in monitoring the agreement. We find Anthony's unsupported statements that BLM's reported facts are in error to be insufficient to rebut the presumption of regularity that attends the inspections and reports provided by IDF&G and BLM. Moreover, Anthony has shown neither the statement of facts made by BLM nor the decision to terminate to be in error. He has failed to carry the burden to show, by a preponderance of the evidence of record, that the termination of the agreement was in error. See, e.g., James M. Mills, 108 IBLA 155, 161 (1989).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 5/

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

5/ IDF&G also recommended that Anthony be required to rehabilitate the public lands he used for agricultural crops. The July 26, 1990, notice to Anthony and the Aug. 16, 1990, reply to his counsel both commented on Anthony's responsibility to rehabilitate the land and the liability for costs should it not be done. The appealed decision does not address this issue and appellant has not contested his responsibility to rehabilitate the public lands should his appeal be unsuccessful. The agreement provides that in the event of default, Anthony "will rehabilitate, at his own expense, all public lands used for irrigated agricultural crops" (Agreement at 3, Item 3).